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HIGHLANDS COUNTY

BOARD OF COUNTY COMMISSIONERS

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October 19, 1994

Federal Communications Commission
Washington, D.C. 20554

**RE: In the Matter of Implementation of Sections of the Cable Television
Consumer Protection and Competition Act of 1992
Rate Regulation
MM Docket 92-266 (FCC 93-177)**

Gentlemen:

I am writing to you for information concerning the Report and Order and Further Notice of Proposed Rulemaking in this proceeding adopted April 1, 1993. The Board of County Commissioners of Highlands County, Florida, recently received a letter from Trianon Broadcasting Company (copy enclosed) concerning commercial access to the local Comcast Cable system. What rules are currently in effect concerning access and charges for local programming in Highlands County, Florida, to the Comcast Cable system? What role, if any, does the Board of County Commissioners play in resolving this problem of local access?

Sincerely yours,

J. Ross Macbeth
County Attorney

JRM/lm

Enclosure

cc: Trianon Broadcasting Company (w/out enclosure)
Comcast Cablevision (with enclosure)

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Board of County Commissioners

OCT 10 1994

County Administrator
Highlands County

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TRIANON BROADCASTING COMPANY
P.O. BOX 3753 SEBRING, FLORIDA 33871
PH (813)382-6095
FX(813)382-8695

Highlands County Commissioners
411 Eucalyptus St.
Sebring, Fl. 33870

October 7, 1994

Dear Commissioners,

Trianon Broadcasting is a new company which is a derivative of Carousel Productions that produced a local cable program called "At Home In The Highlands". "At Home" was a weekly show that aired on then Storer Cable Communications' systems in Sebring/Avon Park and delayed broadcast on the Lake Placid system four days later. The contents of the program originally contained local news, sports, a community event billboard, a man on the street asking current event questions, a commentary and interviews with local personalities and officials.

We produced this program with a very small budget and depended solely on commercial insertions for revenue. It was always our intention to produce more local programming to support our endeavor, knowing one program could not survive by its self due to the costs incurred even with a volunteer crew.

Comcast Cable(Then operating as Storer Cable) originally charged Carousel Productions \$300 per hour to air the show. Some time later, Storer agreed to *underwrite* the program by cutting the cost to \$150.

In January, 1994, Carousel Productions produced a new program called "Sports Talk". This was to be the second of several programs that was planned to come on line that covered local interests in our County. When we approached Comcast Cable to air the show, it was anticipated a lower rate could also be arranged, namely a second airing per week at no extra cost. We were denied the request and Comcast refused to negotiate any further. At that point it was obvious further production of any local programming was not viable due to the financial lock out of the cable television franchisee. Sadly, "Sports Talk" never aired and on January 6, 1994 "At Home In The Highlands" was cancelled.

The rate of \$300 per hour that Comcast wanted to charge, and still advertises, is \$280 or over fifteen times the amount that the Federal Communications Commission allows per the 1992 Cable Reform Act.(See attached documentation)

We knew this from the offing, and brought it to their attention. Comcast then stated that the formula to determine the maximum amount for "Leased Access" did not work and was "stayed" by the F.C.C.. Therefor the Cable companies could charge what they pleased. We felt they were in error but did not pursue the issue for two reasons.

- (1) It was decided to pay the rates and hope Comcast would see that our programming to be of community interest and later waive charging all together.
- (2) We were not prepared to bare the costs of Legal action.

As time went on, the second reason became the only one.

Shortly after we ceased production, we were approached by a member of the community to give financial support to bring back local programming. This individual felt as we did in the fact that Highlands County was ready and deserved some type of local television coverage.

Since then, we have pursued the best avenue to bring that coverage to the community. The conclusion was to request carriage as any other cable channel and microwave a twenty four hour signal to the five largest cable systems in the County. These systems are as follows:

- 1) Comcast Cable Sebring/Avon Park
- 2) USA Cable Highlands Ridge
- 3) Buttonwood Bay
- 4) USA Cable Spring Lake
- 5) Comcast Cable Lake Placid

The systems USA owned were apparently being purchased by Sunstate Cable, so they were contacted and informed of our desires. The management was very interested but understandably could not move on it until the acquisition of those systems were complete. Like wise Buttonwood Bay and Comcast Cable were also notified.

Button Wood has not been pursued diligently because of technical problems and the fact that the number of subscribers do not make it a key part of the success of our efforts, but they will be included once the larger systems are secured.

The reason we need a complete program day is to support the programming that does not contain commercials such as telethons, parades, election returns and the like. Also, to keep our commercial rates competitive with other cable channels. Production of programming is not cheap, and we feel that advertisers will not be willing to pay several times for spots during local programming than what can be purchased on CNN.

On October 6, Larry Trammel informed us that Comcast was not interested in carrying our programming. The reasons given were that we were in competition with other program vendors such as the "Sci fi" channel. It is our belief that this is not at all the reason.

Make no mistake, we do recognize the fact that Comcast must make a profit but the reason for denying us is to keep all profits to themselves. Most people do not realize that cable operators have the ability to generate income other than the amount that is received from the subscribers. Before the 1992 Cable act, it was common practice for operators to demand part ownership in a programmers company. The large systems then would deny smaller ones access to this programming while receiving dividends from these producers. They receive profits from premium channels such as HBO, Show Time, Pay Per View and others. Also, Comcast sells advertising on several of the channels that are carried on their system. I feel for that reason alone, they are not willing to carry local programming. It boils down to greed, Comcast does not want to invite competition in ad sales.

Our only recourse was to return to leased access and seek help to force Comcast to comply with Federal law and bring their rates down to at least the maximum allowed.

As you are aware, Comcast is coming before you to get approval of the purchase of the USA systems in Spring Lake and Highlands Ridge and we feel it would be the appropriate time to address the issue of local programming.

The inherent cavalier attitude in which they operate can be checked at least in part by your actions. Remember, when approving this sale, Comcast cable will have sole control of all the programming on these cable systems, not you, not the subscribers.

You as individuals probably do not see this side of cable operators, as I stated, cable operators inherently are very arrogant in the way they do business. "Closed Circuit T.V." has more than one meaning, outsiders find it very difficult to get in.

The Cable Act was brought on due to excessive greed and unfair trade practices of most operators. Individually most of the employees of these systems are good people. But collectively a pool of sharks pale in comparison.

Trionon Broadcasting has purchased all the necessary equipment to deliver its signal to the systems mentioned above and acquired towers space to install it on. We have delayed installing this equipment in anticipation of approval from the cable systems to carry us.

Just to inform you of our intentions, we have converted an old 3-D gallery into a production studio to produce as many as nine local programs per week. Also, we are converting a one ton van to a "Live Truck" to bring live video into viewers' homes from almost anywhere in the County. This gives us many possibilities. We have also been told by the Emergency Management Center that they will inform us of any emergency that may need to be past on to the public.

Mostly as I stated, we need to broadcast at least the majority of the day to sell commercial time to support the local productions. We have made arrangements to air NET (National Empowerment Television), which is produced in Washington D.C. and produces programming that covers Capital hill news and commentary. Also we intend to carry portions of the NASA channel which broadcasts many aerospace documentaries and to give the shuttle missions more air time than has been carried by other sources. We have also been in contact with other program vendors that may be of interest to many of our Highlanders. We do expect to change with the desires of the community from time to time.

We feel that what we have to offer is in the best interest of our community and with your help it can become a reality before the end of this year. But without it, it may be far into the future. Our efforts to negotiate with Comcast for the last two years is testimony to that.

We ask you to intervene while you have the opportunity to make it possible.

Please feel free to contact us for any additional information that you may desire.

We intend to be present during the hearing on November 8.

Thank you for your time,

**Tim K. Scott
Executive Producer
Trianon Broadcasting**

**LEASED ACCESS RATE PER FEDERAL COMMUNICATIONS COMMISSION
REPORT AND ORDER ADOPTED APRIL 1, 1993**

The following is a break down and calculation of the estimation of the maximum leased access rate Comcast can charge on the basic tier per one hour. This is an estimation due to the fact we did not have a current list of the number of subscribers.

F.C.C. Formula for monthly rates:

The rate a subscriber pays for a channel on the requested tier (*Most expensive*)
Minus what the operator pays for that channel
Times the percentage of subscribers that will receive it
Equals the maximum an operator can charge per subscriber

or

Basic tier, subscribers pay \$.856 per channel (\$7.70 / 9 channels)
Minus \$ 0 (All channels are off air broadcasters)
Times 1 (Or 100%)
Equals \$.856 per subscriber per month

or simply

$$.856 - \$0 \times 1 = $.856$

\$.856 times 16,500 (Estimated subscribers) equals \$ 14,124 per month
Divided by 722.4 (Average hours per month) equals \$ 19.55 per hour

In January, 1994 Comcast was asked in writing to justify their rate of \$300. The request went unanswered. This is in character in the way Comcast has dealt in the past.

Comcast plays on the ignorance of the public or the inability to act against them.

We have been pleading with Comcast for more than two years with no avail. Now that this situation has been brought to your attention, you have the ability to act on it.

TRIANON BROADCASTING

Attached are copies of portions of the Report and Order adopted April 1, 1993 and released May 3, 1993 by the Federal Communication Commission.

Much of the document not included addressed other matters or irrelevant discussions. We have included only the portions that we felt necessary to help inform you on the issue and get a feel for what the F.C.C. is wanting.

This Order is still in effect and was the latest Rule making by the F.C.C. on this matter.

We are sending this to you now in hope that you will have enough time before the November 8 meeting to review and verify this information.

**Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-177
Washington, D.C. 20554**

In the Matter of)
)
Implementation of Sections of) MM Docket 92-266
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
Rate Regulation)

**Report and Order
and
Further Notice of Proposed Rulemaking**

Adopted: April 1, 1993

Released: May 3, 1993

By the Commission: Commissioner Marshall not participating;
Commissioners Barrett and Duggan issuing
separate statements.

Comment Date: June 17, 1993

Reply Comment Date: July 2, 1993

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assessing the effect of this option and to calculating the benchmarks, we do not find this option to be feasible at this time.

513. The cost-of-service option would likely require extensive accounting, recordkeeping, and costing requirements. We find that it is difficult to justify the cost of this approach, particularly when we are not also requiring it for basic tier rate determinations. It is also possible that substantial migration will occur under this approach, with uncertain and possibly harmful effects on the structure of the industry.

514. When we solicited comments in the Notice on the possibility of establishing marketplace rates for leased access, we stated that where a competitive market exists for leased commercial access, cable operators would be able to charge the market rates for leased access. No comments were received indicating that any competitive market for leased commercial access exists, and we are not aware of any. Consequently, this option does not appear to offer any promise as a tool for setting rates at this time.

515. The record, however, has revealed a fourth option that we believe will enable us to define maximum reasonable rates that a cable operator may charge for commercial leased access that will assure that "the price...of such use will not adversely affect the operation, financial condition or market development of" cable systems and will still enable commercial leased access to become the source of program diversity and of competition to cable operators that Congress intended it to be.¹³¹¹ The option, a variation on the fourth option we discussed in the Notice, uses the subscriber rates for basic, cable programming and premium services and the rates the cable operator pays to obtain the programming on those tiers of services to define maximum reasonable rates. We adopt this standard as an initial guide until we gain more experience in this area.

516. As a first step to setting maximum rates that will achieve the potentially conflicting goals of Section 612, we conclude that it is necessary to separate programmers seeking to lease commercial access channels into three distinct categories--those proposing to charge subscribers directly on a per-event or per channel basis to view their programming; those proposing to use the channel for more than fifty percent of their lease time to sell products directly to customers (e.g., home shopping networks, infomercials); and all others. We will require cable operators to charge different maximum monthly access rates to each category of programmers.

¹³¹¹ Communication Act, § 612 (c) (1), 47 U.S.C. § 532 (c) (1).

517. By examining the existing payment arrangement between a cable operator and nonaffiliated providers of programming on the operator's system, it is possible to determine the monthly price per subscriber that a cable operator pays to carry that programming. It is also relatively simple, at least within broad categories, to determine the monthly price subscribers pay to view that programming. With certain refinements, the difference between those two prices can be viewed as an implicit fee that the programmer pays to be carried on that system. For each of the three categories of programmers defined in the preceding paragraph, we will require a cable operator to identify the programmers it carries on non-leased access channels that would also fall into that category. The cable operator must calculate the implicit fee charged each such programmer and identify the highest fee among them. That fee will be the maximum rate that the cable operator may charge a programmer in that category for commercial leased access.

518. The implicit fee for a contracted service should recover the value of channel capacity only. Thus it should not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing or studio services). If the contract used to substantiate a maximum reasonable rate requires the cable operator to provide, in addition to channel capacity, other services for which the payment bases are not separately set out in the contract, reasonable adjustments must be made to exclude the value of the other services when the implicit rate is calculated. Once these adjustments are made to the monthly per subscriber rate the operator is paying the programmer to carry its programming, the implicit fee can be determined through a two-step calculation. First the operator should subtract the adjusted rate from the rate per month that a subscriber pays to receive the programming. Then it should multiply this difference by the percentage of its subscribers able to receive that channel or programming. The result is the implicit fee per subscriber for use of the channel.¹³¹² For each of the three program

¹³¹² Thus, if a cable operator pays a premium channel programmer \$4.00 per subscriber for its programming and charges a retail price of \$10.00 to its subscribers, of whom 25 percent subscribe to the premium channel, then the implicit fee per subscriber is:

$$[(\$10.00 - \$4.00 \times .25) = \$1.50.]$$

If a cable operator carries a public broadcasting station on its basic tier, it pays nothing for the programming. Assuming there are 20 channels on the basic tier, and the monthly rate for basic tier service is \$10.00, then a subscriber fee to view this channel is \$.50. Because all its subscribers subscribe to the basic tier,

categories, the highest of these fees would be the maximum monthly leased access rate per subscriber that the operator could charge a programmer. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate.

519. We conclude that, at least initially, maximum leased access rates based on the highest implicit fee charged any nonaffiliated programmer within the same category constitutes a reasonable approach to determine rate ceilings for commercial leased access.¹³¹³ We believe such rates are fair because they are derived from the highest market value of channel capacity for the system. Notwithstanding the possible existence of a monopsony relationship between the operator and the programmer paying the maximum, the amount paid or otherwise foregone by any unaffiliated programmer would nevertheless substantiate a maximum value of at least that amount for channel capacity. Lower rates could, of course, be negotiated.

520. We are requiring cable operators to calculate the maximum reasonable rates for each rate classification annually based on the contracts in effect in the previous calendar year. A schedule of rates shall be provided on request to prospective leased access programmers. In addition, operators shall maintain for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the net implicit fees, and justification for all adjustments.¹³¹⁴

521. We expect that setting maximum rates on this basis will eliminate uncertainty in negotiations for leased commercial

the implicit monthly fee per subscriber for access to this channel is:

$$[(\$0.50 - \$0.00) \times 1.00] = \$0.50.$$

We observe that, where necessary to determine the value to a subscriber of a single channel on a tier, the rate calculation described above contemplates dividing the cost of the total tier by the number of channels located on that tier.

¹³¹³ If the operator carries no unaffiliated programmer in the category for which leased access is sought, the leased access rate may be based on the highest implicit fee charged for that classification by a cable system with the same number of subscribers, of total channels and of satellite channels.

¹³¹⁴ The Commission will follow its procedures for treatment of proprietary information, see 17 C.F.R. § 0.459, where the cable operator asserts proprietary information is necessary to justify the schedule of rates.

access. It will also automatically lower the starting point for negotiations for a substantial number of potential programmers who are not in the same programming classification as those paying the highest implicit fee, and, in some cases the maximum rate per subscriber will be no more than a small portion of the basic service tier fee. Thus, we are making our decision in this matter based on an expectation that, under these conditions, interest in the use of the leased access market will rise because rates will be low enough to entice programmers, particularly in the programming classifications with the lower implicit fees, to use leased commercial access. Further, as use of lease access capacity at lower rates increases, operators will have an incentive to encourage entrance of new programmers in higher rate classifications in order to maximize the revenue they receive from their leased access capacity.

522. This approach to setting maximum reasonable leased access rates will impose a minimal regulatory burden on cable operators. Maximum rates will not only be readily determinable by each operator with no burdensome accounting and costing requirements, but they will also be easily verifiable by regulators, or by mediators under an Alternative Dispute Resolution proceeding, who will generally need only to review the supporting documentation for rate calculations and, subject to appropriate safeguards to protect proprietary information, the contracts between operators and programmers on non-leased access channels.

b. Access Rates for Not-for-Profit Programmers

i. Background

523. In the Notice, we sought comment on whether the Cable Act of 1992 empowers us to set a lower maximum rate for leased commercial access for not-for-profit programmers, whether lower rates for not-for-profit organizations could help create the diversity of programming sources sought by the drafters of Section 612, and whether there is a need for special rates for not-for-profit programmers. We also asked to what extent we can permit an operator's costs of providing leased commercial access to not-for-profit programmers to be recovered from other leased access customers or from cable subscribers on all tiers generally. Finally, we sought comment on the impact special rates for not-for-profits would have on subscribers and on programmers.¹³¹⁵

524. We observed in the Notice that the legislative history of the Cable Act of 1984 indicates that Congress may have contemplated that cable operators be permitted to establish separate leased commercial access rate ceilings for different

¹³¹⁵ 8 FCC Rcd at 541, para 153.

§ 76.964 Advance written notification of rate increases.

In addition to the requirement of Section 76.309(c)(3)(i)(B) regarding advance notification to customers of any changes in rates, programming services or channel positions, a cable operator shall give the relevant franchising authority a minimum of 30 days advance written notification of any changes in rates for cable programming service or associated equipment.

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the requirement of 47 U.S.C. § 532.

(b) The maximum commercial leased access rates that a cable operator may charge is the highest implicit net fee charged any nonaffiliated programmer (excluding leased access programmers) within the same program category.

(c) The implicit fee charged an unaffiliated programmer shall be calculated by determining the monthly price per subscriber that the operator pays to carry the programming of nonaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated provider. This difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(d) For each of the three program categories as defined in para. (f) of this section, the highest implicit net fee charged any nonaffiliated provider in each category shall be the maximum monthly leased access rate per subscriber that the operator could charge a commercial leased access programmer in that category. The highest implicit net fee shall be based on contracts in effect in the previous calendar year. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate.

(e) Upon request, a schedule of commercial leased access rates shall be provided to prospective leased access programmers. Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the net implicit fees, and justifications for all adjustments.

(f) For purposes of para. (b) of this section there are three program categories:

(1) Programming for which a per-event or per channel charge is made;

(2) Programming more than fifty percent of the capacity of which is used to sell products directly to customers; and

(3) All other programming.

§ 76.971 Commercial leased access terms and conditions.

(a) (1) The cable operator and unaffiliated commercial leased access user may negotiate channel placement and tier access for leased programming, taking into account:

(i) The nature of the service (pay or general distribution channel, complete channel or individual program);

(ii) The relationship between the charge imposed and the desirability of the channel; and

(iii) The need to provide competition in program delivery and to afford users a genuine outlet for their programming.

(2) Where demand for commercial leased access capacity exceeds available supply, each lessee will be allowed to lease up to one channel's capacity.

(b) Cable operators may not apply programming production standards to leased access that are any higher than those applied to public, educational and governmental access channels.

(c) Cable operators are required to provide unaffiliated leased access users the minimal level of technical support necessary for users to present their material on the air, and may not unreasonably refuse to cooperate with a leased access user in order to prevent that provider from obtaining channel capacity, provided however, that leased access providers must reimburse operators for the reasonable cost of any technical support that operators actually provide.

(d) Cable operators may require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels.

(e) Cable operators may not set terms and conditions for commercial leased access use based on content, except:

(1) To the limited extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person; or

(2) To comply with 47 U.S.C. § 532(h), (j) and § 76.701.

(f) (1) A cable operator shall provide billing and collection services for commercial leased access cable users, unless the

operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access users an alternative substantially equivalent to that offered comparable non-leased programmers.

(2) If an operator can make the showing required in Para. (f)(1) of this section, it must, to the extent technically feasible, make available data necessary to enable a third party to bill and collect for the leased access user.

§ 76.975 Commercial leased access dispute resolution.

(a) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available in accordance with the provisions of Title VI of the Communications Act may bring an action in the district court of the United States for the Judicial district in which the cable system is located to compel that such capacity be made available.

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act or our implementing regulations, §§ 76.970 and 76.971, may file a petition for relief with the Commission.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's Rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator.

(d) A petition must be filed within 60 days of the alleged violation.

(e) The cable operator or other respondent will have 30 days from the filing of the petition in which to file a response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the highest implicit fee the operator charges for a comparable category of service, and submit the affidavit of a responsible company official in support. If, after a response is submitted, the staff finds a prima facie violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(f) The Commission, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. § 503, denying the petition, or issuing a ruling on the petition or dispute.

(g) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. § 532 or §§ 76.970 and 76.971, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(h) During the pendency of a dispute, a party seeking to lease channel capacity for commercial purposes, shall comply with the rates, terms and conditions prescribed by the cable operator, subject to refund or other appropriate remedy.

§ 76.977 Minority and educational programming used in lieu of deregulated commercial leased access capacity.

(a) A cable operator required by this section to designate channel capacity for commercial use pursuant to 47 U.S.C. § 532, may use any such channel capacity for the provision of programming from a qualified minority programming source or from any qualified educational programming source, whether or not such source is affiliated with cable operator. The channel capacity used to provide programming from a qualified minority programming source or from any qualified educational programming source pursuant to this Section may not exceed 33 percent of the channel capacity designated pursuant to 47 U.S.C. § 532.

(b) For purposes of this section, a qualified minority programming source is a programming source that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned.

(c) For purposes of this section, a qualified educational programming source is a programming source that devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, or the arts and has a documented annual expenditure on programming exceeding \$15 million. The annual expenditure on programming means all annual costs incurred by the programming source to produce or acquire programs which are scheduled to be televised, and specifically excludes marketing, promotion, satellite transmission and operational costs, and general administrative costs.

(d) For purposes of paragraphs (b) and (c) of this section, "substantially all" means that 90% or more of the programming offered must be devoted to minority or educational purposes, as defined in paragraphs (b) and (c) of this section, respectively.

(e) For purposes of subsection (b), "minority" is defined as in 47 U.S.C. 309(i)(3)(c)(ii) to include Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders.